CHUAH AIK KING v. KEYDONESOFT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG J
[CIVIL SUIT NO: WA-22IP-30-05-2016]
30 APRIL 2018

INTELLECTUAL PROPERTY: *Copyright – Infringement – Allegations of infringement of copyright of computer programs – Whether claimant was author/maker of computer programs – Whether claimant could claim copyright in any function of computer program – Whether function of computer program constituted 'idea' – Whether literary work – Whether entitled to copyright protection – Whether programs original in nature – Whether there was infringement of copyright – Copyright Act 1987, ss. 3, 7, 26, 37, 42, 44, 45, 45A, 46, 47 & 53*

EVIDENCE: *Admissibility – Written statement – Witness read from written statement without obtaining leave of court – Written statement not produced to opponent – Whether oral evidence admissible – Evidence Act 1950, s. 159(1), (2)*

The plaintiff commenced a suit against the defendant on the grounds that the defendant's software, the 'Keybilling Management System' ('the Keybilling program'), had infringed the plaintiff's copyright in two computer programs ('the two programs'), namely (i) B3 Café Internet Café Billing Management with Mycard Solution Software Program ('the B3 program'); and (ii) Coin River Net Café Management System ('the Coin River program'). According to the plaintiff, (i) he ran an internet cafe business; (ii) he created the 'MyCard Solution' software ('the MS program') to block students below 12 years of age from having access to the internet in the internet cafe; (iii) he had advised, given his ideas and commissioned Zhengzhou Yilingshin Software Co Ltd ('ZYS'), a company in China, to create the MS program and the parties entered into a copyright agreement ('the 2009 agreement'); (iv) he had complained to the Enforcement Division of the Ministry of Domestic Trade, Co-operatives and Consumerism ('the Ministry') and this led to a raid at the defendant's premises where, the defendant's computers and Keybilling program, *inter alia*, were seized; (v) there were many similarities in the screenshots of computer images between the B3 program and the Keybilling program; and (vi) as a result of the alleged copyright infringement, the plaintiff allegedly suffered losses amounting to RM1,100,000. Refuting the plaintiff's claim, the defendant argued that (i) it was a developer and provider of software for cyber cafe operators; (ii) it appointed ZYS to provide a customised software which could be used by cyber cafe operators; (iii) the Keybilling program was the customised software created by ZYS and offered by the defendant to cyber cafe operators; (iv) it did not have the source codes of the Keybilling program as the copyright of the same vested in ZYS; (v) after the raid by the Ministry, the defendant stopped supplying the

Keybilling program; and (vi) there were differences between the graphic user interface of the B3 program and the Keybilling program. The issues that arose were, *inter alia*, (i) whether the court should expunge the plaintiff's oral evidence given during the cross-examination and re-examination; (ii) whether the raid had any effect on this suit; (iii) whether the plaintiff could claim copyright in a function of a computer program; (iv) whether the plaintiff could rely on his statutory declaration ('the SD'); (v) whether the plaintiff had proven that copyright subsisted in the two programs and was owned by him; and (vi) whether there was copyright infringement under the Copyright Act 1987 ('the CA').

Held (dismissing suit):

(1) During the plaintiff's re-examination, he read from a written statement without obtaining leave of court, under s. 159(1) or (2) of the Evidence Act 1950 ('the EA') to refresh his memory based on the written statement. The written statement was also not produced to the defendant. Notwithstanding the plaintiff's conduct, his oral evidence was admissible because (i) the oral evidence concerned 'facts in issue' and 'relevant facts. Accordingly, the plaintiff's oral evidence may be given under s. 5 of the EA; and (ii) there was nothing in the EA which provided that the plaintiff's oral evidence is inadmissible by reason of the plaintiff's conduct and should be expunged from the court's record. However, the court should scrutinise, with great care, the entire evidence of the plaintiff and not only his oral evidence. (paras 7, 9 & 11)

(2) The raid was carried out pursuant to the powers conferred by ss. 44, 45, 45A, 46 and 47 of the CA. Evidence obtained during the raid may support the prosecution of any offence under the CA which could only be instituted by or with the written consent of the Public Prosecutor under s. 53 of the CA. The seized items may be tendered by any party in this suit, by calling the investigating officer ('the IO') as a witness to tender the seized items, provided that the seized items were 'facts in issue' and/or 'relevant facts' within the meaning of ss. 3 and 5 of the EA. However, the raid, in itself, did not support or oppose this suit. The plaintiff did not call the IO to produce the seized items and accordingly, could not rely on the raid to support this suit. (paras 14-16)

(3) The plaintiff could not claim copyright in any function of a computer program. A function of a computer program constitutes an 'idea' under s. 7(2A) of the CA and is, therefore, not entitled to copyright protection. A function of a computer program, in itself, is not literary work which is protected by copyright under s. 7(1)(a) of the CA. The definition of a 'computer program' in s. 3 of the CA refers to an 'expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an

information processing capability to perform a particular function. It is the 'expression, in any language, code or notation, of a set of instructions' in a computer program (not its function) which attracts copyright protection. (paras 18 & 19)

(4) The plaintiff's SD was not admissible as *prima facie* evidence that copyright subsisted in the two programs and that the plaintiff owned the copyright of the two programs. The plaintiff's SD only exhibited documents purportedly regarding the two programs. Section 42(1)(a)(iii) of the CA mandatorily requires 'true copies' of the two programs to be exhibited in the plaintiff's SD. This suit was based on the plaintiff's claim of copyright in the two programs as literary works, not as graphic or artistic works. Accordingly, the plaintiff should have exhibited in the plaintiff's SD a CD or DVD containing the two programs, as literary works, as a 'true copy' of the two programs. The exhibits did not constitute the definition of a 'computer program' in s. 3 of the CA. (para 24)

(5) The plaintiff failed to prove, on a balance of probabilities, that he was the writer/maker of the two programs. A computer program could only be created by a person who is an 'expert' regarding computer programs within the meaning of s. 45(1) of the EA. The plaintiff had not adduced any evidence regarding his qualification, training, experience and achievement in the creation or development of software. Accordingly, the plaintiff's evidence that he had advised and given his ideas to ZYS regarding the creation of the MS program could not be accepted. Furthermore, the plaintiff failed to adduce any evidence that sufficient efforts have been expended to make the two programs original in character within the meaning of s. 7(3)(a) of the CA. (paras 28 & 30)

(6) According to s. 37(1)(a) of the CA, only an owner of a copyright may file a suit for copyright infringement. The plaintiff failed to discharge the legal and evidential burden to prove, on a balance of probabilities, that copyright subsisted in the two programs and that he was the owner of such a copyright. Accordingly, the plaintiff had no right to institute this suit for copyright infringement under s. 37(1) of the CA. On this ground alone, the suit was dismissed with costs. (para 41)

Case(s) referred to:

Aktif Perunding Sdn Bhd v. ZNVA & Associates Sdn Bhd [2017] 10 CLJ 226 HC ***(refd)***
Alfa Laval (M) Sdn Bhd v. Ng Ah Hai & Ors [2009] 7 CLJ 1 HC ***(refd)***
Autodesk Inc & Anor v. Dyason & Ors (No. 1) [1992] 104 ALR 563 ***(refd)***
Autodesk Inc & Anor v. Dyason & Ors (No. 2) [1993] 111 ALR 385 ***(refd)***
Chau Kam Hoon v. PP [2003] 7 CLJ 365 HC ***(refd)***
Coogi Australia Pty Ltd v. Hysport International Pty Ltd & Ors [1998] 157 ALR 247 ***(refd)***
Dura-Mine Sdn Bhd v. Elster Metering Ltd & Anor [2015] 1 CLJ 887 FC ***(refd)***
Elster Metering Ltd & Anor v. Damini Corporation Sdn Bhd & Anor [2012] 1 LNS 959 CA ***(refd)***

John Richardson Computers Ltd v. Flanders & Anor [1993] FSR 497 ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
MediaCorp News Pte Ltd & Ors v. MediaBanc (Johor Bharu) Sdn Bhd & Ors [2010] 1 LNS 296 HC ***(refd)***
Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2) [2009] 8 CLJ 130 HC ***(refd)***
Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors [2017] 1 LNS 1142 HC ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Petraware Solutions Sdn Bhd & Anor v. Readsoft Aktielbolag & Anor [2014] 1 AMCR 112 ***(refd)***
Risk-X Sdn Bhd v. Capital Market Risk Advisor Sdn Bhd & Ors [2016] 1 LNS 1187 HC ***(refd)***
SAS Institute Inc v. World Programming Ltd [2013] EWHC 69 ***(refd)***
SAS Institute Inc v. World Programming Ltd [2013] EWCA Civ 1482 ***(refd)***
Sebastian v. PP [1970] 1 LNS 144 HC ***(refd)***
Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case [2017] 1 LNS 1648 HC ***(refd)***
Thrustcode Ltd & Anor v. WW Computing Ltd [1983] FSR 502 ***(refd)***
Yuen Chun Yii v. PP [1997] 3 SLR 57 ***(refd)***

Legislation referred to:
Copyright Act 1987, ss. 3(a), 7(1)(a), (c), (2A), (3)(a), (b), 10(1), (2)(a), (3), 13(1), 26(2)(a), 36(1), 37(1), 42(1)(a)(iii), 44, 45, 45A, 46, 47, 53
Evidence Act 1950, ss. 3, 5, 45(1), 51, 101(1), (2), 102, 114(g), 159(1), (2), (4), 161

Evidence Act (Cap 97) [Sing], ss. 161, 163

For the plaintiff - S Kulasegaran; M/s S Kula & Co
For the defendant - Foong Cheng Leong; M/s Foong Cheng Leong & Co

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong J:

Background

[1] The plaintiff (plaintiff) claims that he owns the copyright in two computer programs (two programs) as follows:

(i) "B3 Café Internet Café Billing Management with MyCard Solution Software" program (B3 program); and

(ii) "Coin River Net Café Management System" (Coin River program).

[2] The plaintiff alleges that the defendant company's (defendant) software, "Keybilling Management System" (Keybilling program) has infringed plaintiff's copyright in the two programs under s. 36(1) of the Copyright Act 1987 (CA).

Issues

[3] The following questions arise in this case:

(i) if a witness has given oral evidence based on a written statement (the witness has not obtained leave of the court to refer to the statement and the statement has not been adduced in court):

  (a) can the court decide that the witness's oral evidence is inadmissible and expunge such evidence?; and

  (b) if the witness's oral evidence is admissible, how should the court assess the weight of such evidence?;

(ii) whether a raid on the defendant's premises (raid) by the Enforcement Division of the Ministry of Domestic Trade, Co-operatives and Consumerism (Ministry) supports the plaintiff's claim in this case (this suit);

(iii) in view of s. 7(2A) of the CA, can the plaintiff claim copyright in a function of a computer program?;

(iv) whether the plaintiff can rely on his statutory declaration (plaintiff's SD) as *prima facie* evidence under s. 42(1) of the CA that:

  (a) copyright subsists in the two programs; and

  (b) the plaintiff is the owner of copyright in the two programs;

(v) if the plaintiff cannot rely on plaintiff's SD:

  (a) whether the plaintiff is the "author" of the two programs;

  (b) has sufficient effort been expended to make the two programs original in character within the meaning of s. 7(3)(a) of the CA?;

  (c) whether the two programs have been "written down, recorded or otherwise reduced to material form" as required under s. 7(3)(b) of the CA;

  (d) whether the two programs qualify for copyright protection:

    (1) when the two programs have not been "authored" by a "qualified person" within the meaning of s. 10(1) of the CA;

    (2) if the two programs are not first published in Malaysia as required by s. 10(2)(a) of the CA; and

    (3) when the two programs are not made in Malaysia as provided in s. 10(3) of the CA;

  (e) whether an adverse inference under s. 114(g) of the Evidence Act 1950 (EA) should be drawn against the plaintiff for not calling the person from Zhengzhou Yilingshin Software Co Ltd (ZYS) who has authored the two programs; and

(vi) whether the Keybilling program has infringed the plaintiff's copyright in the two programs (alleged copyright infringement). In this regard:

(a) has the plaintiff proven that copyright subsists in the two programs and he is the owner of such a copyright as required by s. 37(1) of the CA?;

(b) is the plaintiff required to adduce expert evidence under s. 45(1) of the EA to prove the alleged copyright infringement?; and

(c) whether the alleged copyright infringement can be proven by the plaintiff showing a similarity in the screenshots of computer screen images and graphic user interface between the two programs and Keybilling program.

Plaintiff's Case

[4] The plaintiff is the sole proprietor of "B Three Technology", a registered business. The plaintiff gave the following evidence, among others:

(i) the plaintiff runs an internet café business;

(ii) the plaintiff has created "MyCard Solution" software (MyCard Solution program) but the "main engine" to run MyCard Solution program is created by ZYS, a company in the People's Republic of China. Regarding MyCard Solution program:

(a) the plaintiff has "created" MyCard Solution program in the sense that he had advised, given his ideas and commissioned ZYS to create MyCard Solution program. To support such an assertion, the plaintiff relies on a "copyright agreement" dated 13 January 2009 between the plaintiff and ZYS (2009 agreement); and

(b) the function of MyCard Solution program is to block students below 12 years of age from having access to the Internet in internet café;

(iii) the plaintiff relies on a "copyright agreement/exclusive assignment" dated 10 January 2013 between B Three Technology and ZYS [2013 agreement (10 January 2013)]. Reliance was also placed by plaintiff on a "letter of authorisation" dated 20 January 2013 by ZYS to B Three Technology (authorisation letter (20 January 2013)];

(iv) the plaintiff claims to own copyright in the two programs by relying on the plaintiff's SD. The hardcopy of the "source codes" of the two programs have been adduced by the plaintiff in this case. According to the plaintiff, the author of the two programs' source codes is one Mr Feng Jiang (Mr Feng) from ZYS;

(v) the plaintiff has sold B3 program to many entities (except the defendant);

(vi) the defendant has infringed the plaintiff's copyright in the two programs. The plaintiff has complained about the alleged copyright infringement to the Ministry and this has led to the raid. During the raid, the Ministry's officers had seized, among others, the defendant's computers and Keybilling program (seized items);

(vii) as a result of the alleged copyright infringement, the plaintiff alleges that he has suffered loss amounting to RM1,100,000 which consists of the following:

(a) payment of RM150,000 to ZYS;

(b) a sum of RM600,000 has been paid in respect of MyCard Solution program and B3 program; and

(c) loss of business amounting to RM350,000; and

(viii) the plaintiff alleges that there are many similarities in the screenshots of computer screen images between B3 program and Keybilling program. The plaintiff also relies on a "selective" comparison between the screenshots of graphic user interface of B3 program and Keybilling program.

Defendant's Case

[5] Mr Lim Kah Beng (SD1) is a director of the defendant. According to SD1, among others:

(i) the defendant is a developer and provider of software for cyber café operators;

(ii) the defendant had been asked by Mr Ng Shun Ming (SD2) to provide a cyber café management software for cyber café operators in the Klang Valley (SD2's request). Pursuant to SD2's request, the defendant appointed ZYS to provide a customised software which could be used by cyber café operators. The Keybilling program was the customised software created by ZYS and offered by the defendant to cyber café operators;

(iii) the defendant does not have the source codes of Keybilling program because copyright in Keybilling program vests in ZYS;

(iv) after the raid, the defendant stopped supplying Keybilling program; and

(v) there are differences between the graphic user interface of B3 program and Keybilling program.

[6] SD2 testified, among others, as follows:

(i) in 2012, the Selangor State Government required cyber café operators in Selangor to install B3 program (provided only by the plaintiff) to operate their cyber cafés. If cyber café operators in Selangor did not install B3 program, their licenses would not be renewed. New licenses would not be issued to cyber café operators who did not use B3 program;

(ii) the plaintiff imposed an exorbitant license fee of RM1,999 for B3 program. Furthermore, the B3 program has limited functions; and

(iii) SD2 together with other cyber café operators in Selangor formed a society, "Persatuan Pengusaha Pusat Siber Sihat Kuala Lumpur dan Selangor" (Society). Members of the society could purchase Keybilling program at a price of RM999.

Whether Court Should Expunge Plaintiff's Oral Evidence Given During Cross-examination And Re-examination

[7] During the plaintiff's re-examination, the court noticed that he was reading from a written statement (written statement). The plaintiff did not obtain leave of court under s. 159(1) or (2) of the EA to refresh his memory based on the written statement. Sections 159 and 161 of the EA provide as follows:

> **Refreshing memory**
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> 159(1) A *witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.*
>
> (2) **The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.**
>
> (3) **Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of that document:** Provided the court is satisfied that there is sufficient reason for the non-production of the original.
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> (4) An expert may refresh his memory by reference to professional treatises.
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> **Right of adverse party as to writing used to refresh memory**
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> s. 161. **Any writing referred to under section 159 or 160 must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.**
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> (emphasis added).

The court inquired from the plaintiff on whether he would wish to apply for the court's permission under s. 159(1) of the EA (if the written statement is made by the plaintiff) or s. 159(2) of the EA (if the written statement is made by a person other than the plaintiff) to refresh his memory based on the written statement. The court informed the plaintiff that if the court grants permission to the plaintiff to do so, according to s. 161 of the EA, a copy of the written statement must be given to the defendant and the defendant's learned counsel has the right to adduce the written statement as evidence in

this case and may thereafter cross-examine the plaintiff based on the written statement. Upon hearing this, the plaintiff declined to apply for leave of court under s. 159(1) or (2) of the EA to refresh his memory based on the written statement.

[8] Firstly, I am of the following view regarding the refreshing of a witness's memory based on a document during trial:

(i) there must be a need for a witness to refresh his or her memory based on a document. In *Chau Kam Hoon v. PP* [2003] 7 CLJ 365; [2003] 4 MLJ 686, at p. 371 (CLJ); p. 693 (MLJ), Augustine Paul J (as he then was) decided as follows:

> *A witness cannot refresh his memory as of right and must therefore get the leave of Court to do so* (see *Public Prosecutor v. Paneerselvan & Anor* [1991] 1 MLJ 106; *Re The Detention of Leonard Teoh Hooi Leong* [1988] 1 MLJ 757; *Moomin bin Seman v. Public Prosecutor* [1993] 3 MLJ 282). *There must be a need for the witness to refer to a document and it would not be proper to grant leave to refer to such a document simply because a request was made by a party (see Yuen Chun Yii v. PP [1997] 3 SLR 57). The facts which entitle a witness to refresh his memory ought to be first elicited from him, that is to say, that he had no clear independent recollection but wanted to refresh his memory by seeing the writing (see Sabitri Thakurain v. FA Svi AIR* [1933] 306).
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> (emphasis added);

(ii) if there is a need for a witness to refer to a document (made by the witness) to refresh his or her memory:

(a) the document should be made at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in the witness's memory (requirement of contemporaneity). The requirement of contemporaneity has been explained in *Chau Kam Hoon*, at pp. 369-370 (CLJ); 692-693 (MLJ), as follows:

> *In order to ensure that the document referred to is reliable, s. 159 provides that the writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory or if the writing is made by someone else it must have been read by the witness within the aforesaid time and known by him to be correct*. In commenting on the time of preparation of the document, *Sarkar on Evidence* (15th edn) Vol 2 says at p. 2298:
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> > *It is plain that no precise time limit is possible. The law does not require that the writing must have been made the moment the transaction took place. If it is not possible to make it contemporaneously with the transaction, it must be made so soon afterwards that it may be reasonably inferred that the facts were fresh in the mind. Whether the interval between the two, is such as to*

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justify the presumption that memory became impaired, is a matter depending on the circumstances of each case and the retentive faculty of each witness. The section gives the court a discretion and if it considers it probable that the facts were fresh in the witness's mind when the writing was made, it will decide in favour of the document. In the case of a document written by another, it must be read and its accuracy recognised by the witness within the aforesaid time.

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In dealing with the determination of contemporaneity, Stuart-Smith J said in *R v. Da Silva* [1990] 1 All ER 29 at p 32:

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> Counsel for the appellant has drawn our attention to *R v. Graham* [1973] Crim LR 628, in which the court said that a judge should hesitate before deciding that a statement made 27 days after the event was contemporaneous. But the court was not there saying that a statement made after that length of time could not be contemporaneous. **It is a question of fact and degree in each case, and the matter should be investigated to see that the events were fresh in the witness's mind after the lapse of time**. Much will depend on the nature of the evidence to be given. Where, for example, a witness purports to give a *verbatim* account of a conversation, the note will need to have been made much nearer the time than if he merely purports to give the general effect of a conversation.

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(emphasis added); and

(b) if the document to refresh a witness's memory, is not made by the witness, s. 159(2) of the EA requires the document to have been read by the witness within a time period which complies with the requirement of contemporaneity and at the time when the witness read the document, the witness knew the document to be correct;

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(iii) when the court exercises its discretion to grant leave for a witness to refresh his or her memory based on a document:

(a) s. 161 of the EA provides that the adverse party has right to a copy of the document - please see *Chau Kam Hoon*, at pp. 694-695;

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(b) the adverse party may tender the document as an exhibit in the case; and

(c) the adverse party may cross-examine the witness based on the document pursuant to s. 161 of the EA - please see *Chau Kam Hoon*, at p. 695; and

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(iv) by reason of s. 159(4) of the EA, an expert witness giving evidence under s. 45(1) of the EA may refresh his or her memory based on any reference material without leave of court. The expert witness may use such reference material to support the grounds of his or her expert opinion under s. 51 of the EA.

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[9] In this case, the plaintiff had committed the following acts (plaintiff's conduct):

(i) when the plaintiff gave evidence during cross-examination and re- examination (plaintiff's oral evidence), he did not apply for leave of court to refresh his memory based on the written statement; and

(ii) the plaintiff did not produce the written statement to the defendant.

The first question that arises is whether the plaintiff's oral evidence is rendered inadmissible by reason of the plaintiff's conduct. In *Chau Kam Hoon*, the High Court had held inadmissible the evidence of a prosecution witness who had refreshed his memory based on a record but the defence counsel was not given a right under s. 161 of the EA to cross-examine the prosecution witness based on the record. It was decided in *Chau Kam Hoon*, at p. 373 (CLJ); p. 695 (MLJ), as follows:

> In this case, the question of a denial of the right to inspect the document does not arise as no application was made to that effect. But *the defence was precluded from cross-examining PW3 on the entries in the record book on the ground that the court has given leave to the witness to refer to it. This is clearly irregular. The defence has been denied the opportunity to verify the document used by PW3 to refresh his memory. It is a miscarriage of justice as the defence has been deprived of its statutory right. Evidence is not admissible when a party has been deprived of his statutory right of cross-examination on it (see Baliram Tikaram v. Emperor AIR (32) [1945] Nag 1). The evidence of PW3 is therefore not admissible.*
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> (emphasis added).

[10] With respect, I am not able to follow *Chau Kam Hoon*. I am of the diffident view that if a witness has refreshed his or her memory based on a document and the adverse party is not given the document and/or is deprived of the right to cross-examine the witness based on the document (contrary to s. 161 of the EA), the testimony of the witness is still admissible but in ascertaining the weight to be attached to such evidence, the court should scrutinise such evidence with great care. My opinion is premised on the following reasons:

(i) our ss. 159 and 161 of the EA are identical to ss. 161 and 163 of the Evidence Act of Singapore [EA (Singapore)]. Accordingly, Singapore cases on the construction of ss. 161 and 163 EA (Singapore) may be considered in the interpretation of our ss. 159 and 161 of the EA. I rely on the following two Singapore High Court cases:

(a) in *Sebastian v. PP* [1970] 1 LNS 144; [1970] 2 MLJ 76, at 76, Winslow J decided as follows:

> *The learned deputy public prosecutor on the authority of Lau Pak Ngam v. The Queen [1966] HKLR 246; [1966] Crim LR 443 submitted that there was no rule that a witness should not refresh his memory from his former statement to the police. That case decided*

further, however, that anything in the nature of coaching would be reprehensible. Mr. Marshall on the other hand referred to an Indian case (Kanbi Vaghji Savji v. State of Gujarat [1968] Crim LJ 54) which held that the value to be attached to the evidence of such a witness would depend on the circumstances of the particular case, since there was a likelihood that the witness would depose to what was contained in his previous statement rather than to what he actually recollected about what he had previously said. I would add, with respect, that another danger is, as adverted to in the Hong Kong case cited earlier, that a witness, who has refreshed his memory from his previous statement, might feel obliged to adhere to his previous statement even if he no longer believed it to be true. I might observe, however, that the Indian authorities cited by Mr. Marshall are based on section 162 of the Indian Criminal Procedure Code which differs from our section 121.

In the current appeal it was all the more important that the district judge should have scrutinised the evidence of P.W.9, Lee Kee Fatt, with even greater care than usual because, not only had he had his memory refreshed from his previous statement, parts of which "may have been" read out to him over and over again (according to the officer conducting the investigation), but he was also clearly an accomplice and the principal witness on whom the prosecution rested all their hopes for a conviction of the appellant.

(emphasis added); and

(b) Yong Pung How CJ held as follows in *Yuen Chun Yii v. PP* [1997] 3 SLR 57, at paras. 25 and 26:

25. *Section 163 EA is worded in mandatory terms. In Re Jhubbo Mahton 12 CLR 233, Field J observed that the grounds for permitting the adverse party the right to be shown the document are (i) to secure the full benefit of the witness's recollection as to the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement (see also Republic of India v. GP Rajan* [1967] AIR 115 Or).

26. *The prosecution's refusal to show the defence the CPIB statement was in violation of a statutory entitlement, which must have been intended to safeguard the interests of the adverse party. As a result, the prosecution was effectively permitted to put leading questions to Chia during examination-in-chief. Answers given in response to leading questions may still be admissible … .*

(emphasis added);

(ii) according to s. 5 of the EA, evidence may be given regarding a "fact in issue" (defined in s. 3 of the EA) and a "relevant fact" (please see ss. 3 and 5 of the EA). If the evidence of a witness who has refreshed his or her memory based on a document, concerns a "fact in issue" or a "relevant fact", such evidence may be given under s. 5 of the EA (notwithstanding a breach of s. 161 of the EA); and

(iii) s. 161 of the EA does not provide, expressly or by necessary implication, that a breach of s. 161 of the EA shall render inadmissible the testimony of a witness who has refreshed his or her memory based on a document.

[11] In this case, the plaintiff did not apply for leave of court to refresh his memory based on the written statement. In this sense, *Sebastian*, *Yuen Chun Yii* and *Chau Kam Hoon* are distinguished from this case. Having said that, I am of the following view:

(i) notwithstanding the plaintiff's conduct, the plaintiff's oral evidence is admissible in this case. This is due to the following reasons:

(a) the plaintiff's oral evidence concerns "facts in issue" and/or "relevant facts" in this case. Accordingly, the plaintiff's oral evidence may be given under s. 5 of the EA; and

(b) there is nothing in the EA which provides that the plaintiff's oral evidence is inadmissible by reason of the plaintiff's conduct and should be expunged from the court's record; and

(ii) although the plaintiff's oral evidence is admissible in this case, in deciding whether the court should attach any weight to the plaintiff's oral evidence, the court should scrutinise with great care the entire evidence of the plaintiff (not only the plaintiff's oral evidence). This is due to the following reasons:

(a) the plaintiff's oral evidence might not be his testimony but might be based on the written statement. Worse still, the plaintiff might have adhered to the written statement even if he did not believe the written statement to be true. In other words, the plaintiff might have been coached to testify in this case based on the written statement; and

(b) this case concerns computer programs. There is no evidence that the plaintiff is an expert on computer programs as understood in s. 45(1) of the EA (please see sub-para. 28(ii) below). Accordingly, there is a genuine concern that the written statement could have been prepared by an expert regarding computer programs (who is not called by the plaintiff to testify in this suit) and has been wrongly relied on by the plaintiff in this case.

Credibility Of Witnesses

[12] As explained in the above paras [7] to [ii], due to the plaintiff's conduct, the court has to scrutinise carefully all of the plaintiff's evidence. After a careful examination of the totality of the plaintiff's evidence in this case, I find as a fact that the plaintiff is not a credible witness. This finding of fact is supported by the following evidence and reasons:

(i) the plaintiff signed the 2009 agreement and 2013 agreement (10 January 2013) (for B Three Technology). The 2009 agreement concerns only B3 program (version 1.3.1). The 2009 agreement purported to assign absolutely ZYS's copyright in B3 program (version 1.3.1) to the plaintiff. Confusingly, the 2009 agreement referred to ZYS as the party who is commissioned by the plaintiff!

Annexure A to 2013 agreement (10 January 2013) provides that the subject matter of 2013 agreement (10 January 2013) is Coin River program, B3 program (version 1.3.1) and "derivative works" of B3 program (three programs). The 2013 agreement purported to assign absolutely ZYS's copyright in the three programs to the plaintiff. If ZYS's copyright in B3 program (version 1.3.1) had earlier been assigned absolutely to the plaintiff by virtue of 2009 agreement, there is no reason why the same software should be assigned a second time by ZYS to the plaintiff by way of 2013 agreement (10 January 2013). Inexplicably, the 2013 agreement (10 January 2013) did not refer to the 2009 agreement. There is a serious doubt regarding the genuineness of 2013 agreement (10 January 2013) and 2009 agreement;

(ii) in the plaintiff's witness statement (answer to question no. 34), he testified, among others, that certain screenshots of computer screen images of B3 program and Keybilling program were "100%" the same. During cross-examination, the plaintiff admitted those screenshots of computer screen images of B3 program and Keybilling program were not "100%" the same;

(iii) the plaintiff's solicitors sent a demand dated 2 February 2013 to the defendant (plaintiff's demand) regarding the alleged copyright infringement of B3 program (version 1.3.1). The plaintiff's demand did not allege that the defendant had infringed the plaintiff's copyright in Coin River program. It is to be noted that the plaintiff's demand had been sent after the conclusion of the 2013 agreement (10 January 2013). If the plaintiff had ownership of copyright in Coin River program by virtue of 2013 agreement (10 January 2013), the plaintiff's demand should have included Coin River program. Furthermore, the cover page of 2013 agreement (10 January 2013) stated the name and contact details of the plaintiff's solicitors. In other words, the plaintiff's solicitors had actual knowledge of 2013 agreement (10 January 2013) and the plaintiff's purported ownership of copyright in Coin River program; and

(iv) the penultimate paragraph of the last page of the authorisation letter (20 January 2013) provided that if B Three Technology (the plaintiff is its sole proprietor) intends to file any civil suit regarding the two programs, B Three Technology "shall first seek and obtain the approval" of ZYS. Before filing this action, the plaintiff had not obtained ZYS's approval as required by the authorisation letter (20 January 2013).

[13] I find as a fact that SD1 and SD2 are reliable witnesses. This is because firstly, SD1's oral evidence is corroborated by SD2's testimony. Secondly, SD2's oral evidence is supported by the following documentary evidence:

(i) SD2's letter dated 12 September 2012 to the Selangor State Government's Secretariat (Local Government Section), State Economic Planning Unit (UPEN);

(ii) UPEN's letter dated 26 December 2012 to SD2; and

(iii) SD2's letter dated 1 July 2013 to UPEN.

Whether Raid Has Any Effect In This Suit

[14] The raid has been carried out pursuant to the powers conferred by ss. 44, 45, 45A, 46 and 47 of the CA. Evidence obtained during the raid may support the prosecution of any offence under CA which can only be instituted by or with the written consent of the Public Prosecutor under s. 53 of the CA.

[15] I am of the view that the seized items may be tendered by any party in this civil suit (by calling the investigating officer (IO) as a witness to tender the seized items) provided that the seized items are "facts in issue" and/or "relevant facts" within the meaning of ss. 3 and 5 of the EA. However, the raid, in itself, does not support or oppose this civil suit.

[16] The plaintiff did not call the IO to produce the seized items in this case. Accordingly, the plaintiff cannot rely on the raid to support this suit.

Can Plaintiff Claim Copyright In A Function Of A Computer Program?

[17] During the plaintiff's cross-examination, the plaintiff alleged that the Keybilling program has the same functions as the MyCard Solution program. The issue that arises is whether the plaintiff can claim copyright in the function(s) of a computer program.

[18] I am of the view that the plaintiff cannot claim copyright in any function of a computer program. This is because a function of a computer program constitutes an "idea" under s. 7(2A) of the CA and is therefore not entitled to copyright protection. I rely on the following cases:

(i) in the Court of Appeal case of *Petraware Solutions Sdn Bhd & Anor v. Readsoft Aktielbolag & Anor* [2014] 1 AMCR 112, at paras. 17 and 18, Mohamad Ariff Md Yusof JCA followed Arnold J's judgment in the English High Court in *SAS Institute Inc v. World Programming Ltd* [2013] EWHC 69 and held as follows:

> [17] *The English High Court held [in SAS Institute] there was no infringement of copyright in a software where a second software merely reproduced the "functionality" in that second software without copying the source code or the user manual which embodied the elements of the software.*

A

It was argued before the court that accepting the functionality of a computer programme could be protected by copyright "would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development."

[18] *On the facts of this appeal too, there was no evidence of copying of the structural design of the source code or the manuals. What the defendants created was, in our opinion, another data capture software which had a similar "functionality" with the plaintiffs' software. This outcome could not per se amount to an infringement of copyright. What else could the "system flow" be except a "functionality"? It was too basic to be accepted as a "structural design of the computer program."*

B

C

(emphasis added);

(ii) my research has revealed that Arnold J's decision in *SAS Institute* has been affirmed on appeal, [2013] EWCA Civ 1482, but Lewison LJ in the English Court of Appeal has disagreed with some of Arnold J's reasoning according to Lewison LJ, at para. 74:

D

[74] ... *What is protected is the form of expression of an intellectual creation. The intellectual creation itself is not protected; and the functionality of a computer program does not count as a form of expression. The functionality of a computer program (in the sense of what it does and how it responds to particular inputs) falls on the ideas side of the line ...*

E

(emphasis added).

It is to be noted that *SAS Institute* applies the test of "intellectual creation" (laid down by the Court of Justice of the European Union) to decide originality of expression (which is entitled to copyright protection). Our s. 7(3)(a) of the CA only requires sufficient effort to have been expended to make the work original in character - please see para. 29 below;

F

(iii) in the High Court case of *Alfa Laval (M) Sdn Bhd v. Ng Ah Hai & Ors* [2009] 7 CLJ 1; [2008] 5 MLJ 344, at para. 20 (CLJ); para. 54 (MLJ), Ramly Ali J (as he then was) held as follows:

G

[54] *The court accepts that the CAS program is a copyrightable work under the Copyright Act 1987. On the facts, it is the CAS program as a piece of software that is protected not the functionalities of what it does. This important distinction and difference has to be kept in mind.*

H

(emphasis added);

(iv) Dawson J decided as follows in the High Court of Australia in *Autodesk Inc & Anor v. Dyason & Ors (No. 1)* [1992] 104 ALR 563, at 571-572:

I

Indeed, the significance placed by Northrop J upon the function of the two locks would appear to be in disregard of the traditional dichotomy in the law of copyright between an idea and the expression of an idea. As Lindley LJ

> *said in Hollinrake v. Truswell .*[15] *"Copyright ... does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed." The distinction has been criticised and it is true that it is often difficult to separate* an idea *from its expression, but it is nevertheless fundamental that copyright protection is given only to the form in which ideas are expressed, not to the ideas themselves. The protection of ideas, at all events when the subject of manufacture, is the province of patent law. There is a particular difficulty in distinguishing an idea from its expression in the case of a utilitarian work, such as a computer program, which, in contrast to literary works of an artistic kind, is intended to be useful rather than to please. But it has been held that the idea of a utilitarian work is its purpose or function and that the method of arriving at that purpose or function is the expression of the idea: see Whelan Associates v. Jaslow Dental Laboratory,16 citing Baker v. Selden.*[17] *Thus, when the expression of an idea is inseparable from its function, it forms part of the idea and is not entitled to the protection of copyright.*[18]*...*
>
> (emphasis added).

The High Court of Australia is its apex court;

(v) the respondents who lost their appeal in *Autodesk (No. 1)* applied to the High Court of Australia to rehear that decision in *Autodesk Inc & Anor v. Dyason & Ors (No. 2)* [1993] 111 ALR 385. By a 3-2 majority decision, the High Court of Australia in *Autodesk (No. 2)* declined to revisit *Autodesk (No. 1)*. Mason CJ dissented in *Autodesk (No. 2)* regarding leave to rehear that case but commented as follows, at p. 388:

> *Functionality is not the proper object of copyright protection. As Dawson J stated in Autodesk [No. 1], the purpose or function of a utilitarian work is its idea, while the method of arriving at that purpose or function is the expression of the idea.*[13]
>
> (emphasis added); and

(vi) in *Coogi Australia Pty Ltd v. Hysport International Pty Ltd & Ors* [1998] 157 ALR 247, at 275, Drummond J in the Federal Court of Australia (court of first instance) decided as follows:

> Despite the criticisms that have been made of the accuracy of the proposition, *it is settled law in Australia that copyright protects not the underlying idea, but only the form of expression of the idea: see Autodesk (No 1)* (at CLR 344-5) *and Powerflex Services (at 450). It is also the law in Australia that merely because one program performs the same function as another, that is insufficient to make the one an infringement of copyright in the other: Autodesk (No 1)* (at CLR 344); *Autodesk (No 2)* (at CLR 304) and Powerflex Services (at 455).
>
> (emphasis added).

[19] A person may claim copyright in a computer program (not its function) as follows:

(i) a "computer program" is a "literary work" (please see s. 3(h) of the CA) and is eligible for copyright under s. 7(1)(a) of the CA - please see *Petraware Solutions*, at paras. 4, 5, 11, 12 and 26. Section 3 of the CA defines a "computer program" to mean:

> *an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function* either directly or after either or both of the following:
>
> (a) conversion to another language, code or notation;
>
> (b) reproduction in a different material form;
>
> (emphasis added); and/or

(ii) documents evidencing computer screen images and graphic user interface (from the use of a computer program) may constitute "graphic work" (please see the definition of "graphic work" in s. 3(a) of the CA which includes a "diagram") which falls within the definition of "artistic work" in s. 3(a) of the CA - please see *Petraware Solutions*, at paras. 8, 10 and 26. An artistic work is eligible for copyright under s. 7(1)(c) of the CA.

I am of the following view:

(a) a function of a computer program, in itself, is not a literary work which is protected by copyright under s. 7(1)(a) of the CA. The definition of a "computer program" in s. 3 of the CA refers to an "expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function". It is the "expression, in any language, code or notation, of a set of instructions" in a computer program (not its function) which attracts copyright protection. It was decided in *Petraware Solutions*, at paras. 5 and 12, as follows:

> [5] *By this definition [s. 3 of the CA], the core elements will be the source code (the technical outwardly readable programme of instructions in computer language) and the object code (the converted and machine-readable set of instructions), which in combination generates the software for use by the end-user …*
>
> ...
>
> [12] *These instructions, whether embodied in the source or object codes, are by definition, "literary works" in the context of our [CA] …*
>
> (emphasis added); and

(b) if a plaintiff claims copyright in a document which shows a computer screen image or a graphic user interface in respect of a computer program, the expression of the computer screen image or graphic user interface (not the function(s) of a computer program) on the document is the graphic work and artistic work which is protected by copyright.

[20] Based on the reasons explained in the above paras. 18 and 19, a function of a computer program cannot be protected by copyright. Hence, the plaintiff cannot rely on the functions of the two programs to support this suit.

Whether Plaintiff Can Rely On Plaintiff's SD

[21] I am of the view that this suit is based on the two programs as literary works and not as graphic works or artistic works. This decision is premised on the following reasons:

(i) in para. 4 of the statement of claim (SOC), plaintiff relies on agreements with ZYS. A perusal of 2009 agreement and 2013 agreement (10 January 2013) (two agreements) shows that the plaintiff claims copyright in the two programs as literary works and not as graphic works or artistic works. This is because the two agreements did not concern the expression of computer screen images or graphic user interface (regarding the two programs) on documents;

(ii) paragraph 3 SOC states that the plaintiff is the owner of copyright in the "software" (not in the expression of computer screen images or graphic user interface on documents) of the two programs. Paragraph 4 SOC further claims that the works have been created in 2011 by the plaintiff in the form of software (not in the expression of computer screen images or graphic user interface on documents); and

(iii) in paras. 9, 10, 13, 17, 18 and 19 SOC, the plaintiff alleges that defendant has infringed the plaintiff copyright in the two programs by, among others, reproducing the two programs in Keybilling program and by selling the Keybilling program to third parties. The SOC did not plead that the defendant has copied the plaintiff's expression of computer screen images or graphic user interface (of the two programs) on documents and has sold those documents to third parties.

[22] Section 42(1) of the CA reads as follows:

> s. 42(1) ... **statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be -**
>
> (a) **the owner of the copyright in any works eligible for copyright under this Act stating that**:
>
> (i) **at the time specified herein copyright subsisted in such work**;
>
> (ii) **he or the person named therein is the owner of the copyright; and**

A (iii) **a copy of the work annexed thereto is the true copy thereof**;

...

shall be admissible in evidence any proceedings under this Act and shall be *prima facie* evidence of the facts contained therein.

B (emphasis added).

[23] The Federal Court in *Dura-Mine Sdn Bhd v. Elster Metering Ltd & Anor* [2015] 1 CLJ 887 has interpreted s. 42(1) of the CA. According to Jeffrey Tan FCJ in *Dura-Mine*, at paras. 12 and 29:

C [12] *Clearly, therefore, there was no requirement for the original drawing, original in the sense of not copied or in the sense of the first or the earliest, to be annexed to the affidavit or SD of the respondents. The requirement was for a true copy of the work, in the sense of a true and accurate depiction of the work in which copyright subsisted.*

D ...

[29] *... Under s. 42(1) [CA], an affidavit or SD made by or on behalf of a person claiming the copyright to any works eligible for copyright must strictly comply with the whole of s. 42(1)(a)(i)-(iii). An affidavit or SD that does not, will not be admissible as prima facie evidence. But s. 42 [CA] is far from being the be all and end all of proof. For other than by affidavit or SD, a person claiming copyright could*
E *adduce oral evidence and tender other evidence, the admission of which is not precluded by the Act. Section 42 provides a means but not the only means of proving copyright. And given that oral evidence, which is open to cross-examination and therefore of higher evidential value than affidavit or SD evidence, we agree with the pragmatic approach adopted by some courts to allow oral evidence to augment, correct, and or even supplant a defective s. 42 affidavit or SD.*

F (emphasis added).

[24] Sub-paragraph 5(d) of plaintiff's SD stated as follows (with grammatical and typographical errors):

G Sesalinan karya asal iaitu Coin River Internet Café Management itu dilampirkan disini [*sic*] sebagai LAMPIRAN "A", LAMPIRAN "B" adalah salinan karya B3 Café dan Internet Billing Management Software, LAMPIRAN C adalah Copyright Agreement/Exclusive Assignment bertarikh 10.1.2013, LAMPIRAN "D" adalah Letter of Authorization to Act bertarikh 20.12013 dan LAMPIRAN "E" adalah Copyright Agreement bertarikh 13.1.2009.

H The plaintiff's SD only exhibited documents purportedly regarding the two programs (exhibits). Section 42(1)(a)(iii) of the CA mandatorily requires "true copies" of the two programs to be exhibited in the plaintiff's SD - please see *Dura-Mine*. As explained in the above para. 21, this suit is based on the plaintiff's claim of copyright in the two programs as literary works
I (not as graphic or artistic works). Accordingly, the plaintiff should have exhibited in the plaintiff's SD a compact disc (CD) or digital video disc (DVD) which contains the two programs (as literary works) as a "true copy" of the two programs. The exhibits do not constitute an "expression, in any

language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function" within the meaning of the definition of a "computer program" in s. 3 of the CA. Hence, the exhibits do not constitute true copies of the programs as literary works and have breached the mandatory requirement of s. 42(1)(a)(iii) of the CA (breach). In respect of the Breach, I rely on Nalini Pathmanathan J's (as she then was) judgment in the High Court case of *MediaCorp News Pte Ltd & Ors v. MediaBanc (Johor Bharu) Sdn Bhd & Ors* [2010] 1 LNS 296; [2010] 6 MLJ 657, at paras. 128 and 129, as follows:

> [128] The plaintiffs meet this objection raised by the defendants by contending that a copy of the radio broadcasts is indeed before this court in the form of exhs P2A, P2B, P2C and P2D. However the radio excerpts or programmes were not played in court, nor referred to. *More significantly however, such samples of the radio programmes, even if available in P2A-P2D, comprise a part of the 'infringing' copies as they comprise copies procured from the defendants. Section 42 [CA] envisages that a true copy of the works be produced by the plaintiffs to establish prima facie subsistence and ownership of copyright. Accordingly the requirements of that section and the other sections of the Act are not met. In order to establish copyright in the radio programmes it was incumbent upon the plaintiffs to produce a true copy of, at least, some radio programmes, as they did for the television news programmes.*
>
> [129] *It would be entirely inequitable, in the face of the pleadings in the instant case, where the establishment of copyright is heavily challenged, for this court to hold that the provision of samples of the television news programmes in itself is sufficient to evidence proof of subsistence and ownership of copyright in the radio programmes. Neither is it acceptable, in view of the minimum requirements in s. 42 for this court to rely on exhs P2A-P2D. The court ought to have for its reference a true copy in conjunction with the infringing copy to enable a comparison to be undertaken.*
>
> (emphasis added).

In view of the breach, based on *Dura-Mine* and *MediaCorp News*, the plaintiff's SD is not admissible as *prima facie* evidence that:

(i) copyright subsists in the two programs; and

(ii) the plaintiff owns the copyright in the two programs.

Whether Plaintiff Has Proven Copyright Subsists In Two Programs And Is Owned By Him

[25] The plaintiff has the legal burden under s. 101(1) and (2) of the EA to prove this suit on a balance of probabilities. The plaintiff also has the evidential burden under s. 102 of the EA to adduce evidence in support of this suit. In the Federal Court case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, at paras. 51-59, Jeffrey Tan FCJ has explained the meaning and effect of legal and evidential burden of proof.

[26] The plaintiff's legal burden to prove this suit remains with the plaintiff and does not shift to the defendant. The plaintiff's evidential burden of proof is alleviated (not displaced) by s. 42(1) of the CA (which allows the plaintiff's SD to be admitted as *prima facie* evidence that copyright subsists in the two programs and is owned by the plaintiff). As the plaintiff cannot rely on the plaintiff's SD (please see the above para. 24), the plaintiff is required by s. 102 of the EA to adduce oral and documentary evidence to prove that copyright subsists in the two programs and belongs to him - please see *Dura-Mine*.

Whether Plaintiff Was "Author" Of Two Programs

[27] According to s. 3(a) of the CA, an "author" of a computer program (as a literary work) is its "writer" or "maker".

[28] I find as a fact the plaintiff has failed to prove on a balance of probabilities that he is the writer or maker of the two programs. This finding is based on the following evidence and reasons:

(i) plaintiff has testified that Mr Feng (from ZYS) has authored the source codes of the two programs;

(ii) a computer program can only be created by a person who is an "expert" regarding computer programs within the meaning of s. 45(1) of the EA. Plaintiff has not adduced any evidence regarding his qualification, training, experience and achievement in the creation or development of software. Accordingly, I cannot accept the plaintiff's evidence that he has advised and given his ideas to ZYS regarding the creation of MyCard Solution program. Furthermore, the plaintiff has not tendered evidence in this suit regarding any advice or idea purportedly given by the plaintiff to ZYS regarding MyCard Solution program. Lastly, according to s. 7(2A) of the CA, ideas are not protected by copyright;

(iii) the plaintiff runs an internet café business and does not run a business in the development or provision of computer programs to third parties;

(iv) for reasons explained in para. 39 below, an adverse inference under s. 114(g) of the EA is made against the plaintiff for not calling Mr Feng to testify in this suit; and

(v) the plaintiff is not a credible witness - please see the above para. 12.

Whether s. 7(3)(a) of the CA Has Been Satisfied

[29] The plaintiff has the legal and evidential burden to prove in accordance with s. 7(3)(a) of the CA that sufficient efforts have been expended to make the two programs original in character - please see *Petraware Solutions*, at para. 29.

[30] I am of the view that the plaintiff has failed to adduce any evidence that sufficient efforts have been expended to make the two programs original in character within the meaning of s. 7(3)(a) of the CA.

Has Plaintiff Fulfilled s. 7(3)(b) of the CA?

[31] Section 7(3)(b) of the CA provides that a work "shall not be eligible for copyright unless" the work has been "written down, recorded or otherwise reduced to material form". Section 3 of the CA has defined "material form" in relation to a work, to include "any form (whether visible or not) of storage from which the work ..., or a substantial part of the work ... can be reproduced".

[32] It is clear that by reason of s. 7(3)(b) of the CA, the plaintiff has the legal and evidential burden to prove that the two computer programs have been:

(i) written down;

(ii) recorded; or

(iii) otherwise reduced to "material form" in the sense that the two computer programs have been stored in a form from which the two computer programs or a substantial part of the two computer programs can be reproduced

(three alternative limbs of s. 7(3)(b) of the CA).

[33] In this case, the plaintiff has failed to adduce evidence to prove any of the three alternative limbs of s. 7(3)(b) of the CA. Consequently, the two computer programs shall not be eligible for copyright pursuant to s. 7(3)(b) of the CA.

Whether Two Computer Programs Qualify For Copyright Protection

[34] To qualify for copyright protection, the plaintiff has to fulfil one of the following three alternative conditions:

(i) the author of the two computer programs is a "qualified person" - please see s. 10(1) of the CA. Section 3 of the CA provides for the definition of a "qualified person" as follows:

> (a) **in relation to an individual, means a person who is a citizen of, or a permanent resident in, Malaysia**; and
>
> (b) **in relation to a body corporate, means a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia**;
>
> (emphasis added);

(ii) the two computer programs are first published in Malaysia - please see s. 10(2)(a) of the CA; or

(iii) the two computer programs are made in Malaysia - please see s. 10(3) of the CA.

[35] It is clear that the plaintiff has failed to prove any one of the following circumstances for the two programs to qualify for copyright protection:

(i) as elaborated in the above para. 28, the plaintiff is not the author of the two programs. The author of the two programs is either Mr Feng or ZYS. Mr Feng is neither a Malaysian "citizen" (defined in s. 3 of the CA) nor a permanent resident in Malaysia. ZYS is not a company incorporated under our companies' legislation. Accordingly, s. 10(1) of the CA has not been fulfilled in respect of the two programs;

(ii) no evidence has been adduced by the plaintiff to show that the two programs are first published in Malaysia within the meaning of s. 10(2)(a) of the CA. On the contrary, sub-para. 1(c) in annexure A of the further and better particulars (FBP) dated 11 December 2017 (provided by the plaintiff pursuant to a court order dated 27 October 2016) stated that the two programs were first published in China. The plaintiff is bound by its own FBP; or

(iii) the two computer programs are developed in China (not in Malaysia) on 1 March 2005 - please see sub-para. 1(d) in Annexure A of the plaintiff's FBP. As such, the plaintiff cannot avail himself of s. 10(3) of the CA.

Can Plaintiff Rely On s. 26(2)(a) Of The CA?

[36] Section 26(2)(a) of the CA provides that, among others, when a party commissions another party to create a work, "copyright shall be deemed to be transferred to the person who commissioned the work" - please see *Aktif Perunding Sdn Bhd v. ZNVA & Associates Sdn Bhd* [2017] 10 CLJ 226; [2018] 7 MLJ 692, at sub-paras. 33(2) and (3).

[37] In this case, the plaintiff cannot rely on s. 26(2)(a) of the CA to claim that he has copyright in the two programs because the substance of 2009 agreement purports to assign absolutely ZYS's copyright in B3 program (version 1.3.1) to the plaintiff. The substance of 2013 agreement (10 January 2013) also claims to assign absolutely ZYS's copyright in the three programs to the plaintiff. It is therefore clear that the plaintiff did not commission ZYS to produce the two computer programs by way of the two agreements.

Whether An Adverse Inference Under s. 114(g) EA Should Be Made Against Plaintiff

[38] An adverse inference may be drawn under s. 114(g) of the EA against a party for suppressing material evidence - please see Mohd Azmi SCJ's judgment in the Supreme Court case of *Munusamy v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, at 494.

[39] This court invokes an adverse inference under s. 114(g) of the EA against the plaintiff. This is because the plaintiff should have called Mr Feng, the author of the source codes of the two programs, to testify regarding the development of the two programs. No evidence has been adduced on why Mr Feng could not have been called or subpoenaed to give evidence in this case.

Copyright Infringement

Whether Plaintiff Is Entitled To Sue For Copyright Infringement

[40] Section 37(1) of the CA provides as follows:

> Action by owner of copyright and relief
>
> 37(1) **Infringements of copyrights** and the prohibited acts under sections 36A and 36B **shall be actionable at the suit of the owner of the copyright** and, in any action for such an infringement or prohibited act, the court may grant the following types of relief: ...
>
> (emphasis added).

[41] According to s. 37(1) of the CA, only an owner of a copyright may file a suit for copyright infringement. For reasons expressed in the above paras [27] to [35] and paras [38] and [39], the plaintiff has failed to discharge the legal and evidential burden to prove on a balance of probabilities that copyright subsists in the two programs and he is the owner of such a copyright. Accordingly, the plaintiff has no right to institute this suit for copyright infringement under s. 37(1) of the CA. On this ground alone, this suit is dismissed with costs.

Has Plaintiff Proven Copyright Infringement?

[42] I will now assume that the plaintiff has proven copyright subsists in the two programs and he is the owner of such a copyright. The question now is whether the Keybilling program has infringed the plaintiff's copyright in the two programs.

[43] I reproduce below the definition of "reproduction" (s. 3 of the CA), ss. 13(1) and 36(1) of the CA:

> **reproduction means the making of one or more copies of a work in any form or version**, and in relation to an artistic work includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work, and **reproducing shall be construed accordingly**;
>
> **Nature of copyright in literary**, musical or artistic **works**, films and sound recordings
>
> 13(1) **Copyright in a literary**, musical or artistic **work**, a film, or a sound recording or a derivative work **shall be the exclusive right to control in Malaysia**:
>
> (a) **the reproduction in any material form**;
>
> ...
>
> **of the whole work or a substantial part thereof**, either in its original or derivative form ...

Infringements

36(1) **Copyright is infringed by any person who does**, or causes any other person to do, **without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act**.

(emphasis added).

[44] Section 36(1) of the CA has two limbs - please see *Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors* [2017] 1 LNS 1142; [2017] 7 AMR 560, at paras. 49 and 50. The two limbs of s. 36(1) of the CA are:

(i) when a person (X) does an act which is controlled by copyright under CA (first limb); and

(ii) when a person causes X to do an act which is controlled by copyright under CA (second limb).

[45] Sub-paragraph 1(b) in Annexure A of the plaintiff's FBP alleges that the defendant has copied the two computer programs in their entirety. Sub-paragraphs 3(b) and (c) in Annexure A of the plaintiff's FBP further aver that the defendant has copied the source codes of, among others, certain modules in MyCard Solution. This suit therefore concerns only the first limb (not the second limb), namely whether the defendant has done an act which is controlled by the plaintiff's copyright under CA. This concerns the issue of whether the Keybilling program is a "reproduction" (as defined in s. 3 of the CA) in a "material form" (please see its definition in s. 3 of the CA) of:

(i) the two programs in their entirety; or

(ii) a substantial part of the two programs

within the meaning of s. 13(1) read with the first limb.

[46] Regarding the first limb, I refer to *Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case* [2017] 1 LNS 1648, at para. 59, as follows:

59. *Regarding copyright infringement under the 1st Limb, my research has shown that case law has not spoken in one voice. Firstly, I refer to the 3 elements of copyright infringement under the 1st Limb [3 Elements (1st Limb)] as decided by Low Hop Bing J (as he then was) in the High Court in Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2009] 3 MLJ 525, at paragraph 41. The 3 Elements (1st Limb) are*:

(*1) a plaintiff has to prove sufficient objective similarity between:*

(a) the plaintiff's copyright work or a substantial part of the copyright work, and

(*b) the alleged infringing work (Impugned Work)*

[1st Element (1st Limb)].

Regarding the 1st Element (1st Limb), a visual comparison between the original work and Impugned Work will be undertaken by the court - Megnaway Enterprise, at paragraph 46.

In the Court of Appeal case of *Elster Metering Ltd & Anor v. Damini Corporation Sdn Bhd & Anor* [2012] 1 LNS 595, at paragraphs 9 and 14-15, Ramly Ali JCA (as he then was) referred to the 1st Element (1st Limb) as held by the following English courts:

(i) Diplock LJ's (as he then was) judgment in the Court of Appeal case of *Francis Day & Hunter Ltd & Anor v. Bron & Anor* [1963] 1 Ch 471; and

(ii) Lord Millett's judgment in the House of Lords in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, at 708-709;

(2) *the plaintiff must prove that there is a causal connection between the copyright work and Impugned Work, namely, the Impugned Work is proven to have been copied from the copyright work, whether directly or indirectly [2nd Element (1st Limb)]. The 2nd Element (1st Limb) has been applied in Elster Metering, at paragraphs 9-11 and 28.*

If the 1st Element (1st Limb) is proven by a plaintiff, there is a rebuttable presumption of copying and the evidential burden then shifts to the defendant to prove that the Impugned Work has not been copied from the copyright work or the Impugned Work has been created by the defendant independently of the copyright work - Megnaway Enterprise, at paragraph 43. *It should be emphasised that the legal burden under s. 101(1) and (2) EA to prove the 3 Elements (1st Limb), remains solely on the plaintiff and does not shift at all to the defendant.*

...;

(3) **what has been copied in the Impugned Work must constitute a substantial part of the original work [3rd Element (1st Limb)**]. The 3rd Element (1st Limb) has been referred to in *Elster Metering*, at paragraph 16.

(emphasis added).

[47] According to *Elster Metering Ltd & Anor v. Damini Corporation Sdn Bhd & Anor* [2012] 1 LNS 959 (Court of Appeal's judgment) and *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2)* [2009] 8 CLJ 130; [2009] 3 MLJ 525 (High Court's decision), the first element of first limb (first element) is that there must be proof of sufficient objective similarity between:

(i) the source codes and object codes of the two programs or a substantial part of those source codes and object codes, and

(ii) the source codes and object codes of Keybilling program.

[48] I am of the view that the first element can only be decided by the court with the assistance of evidence from an expert on computer programs under s. 45(1) of the EA. I rely on Azizah Nawawi J's judgment in the High Court case of *Risk-X Sdn Bhd v. Capital Market Risk Advisor Sdn Bhd & Ors* [2016] 1 LNS 1187, at paras. 27 and 31, as follows:

A [27] *Witnesses who know about computer programmes or persons who are experts in computer programmes must come to court to explain the substantive similarities in the both programmes. Only then can this Court come to a finding of substantive similarity*. We are not dealing with a simple copyrighted picture here, where the court can see and make the comparison with the naked eyes.

B ...

[31] *In this case there is no evidence at all to establish an infringement. There was no analysis made to both computer programmes in order to ascertain the substantive similarity, when viewed objectively. In the premise, I find that the Plaintiff has failed to prove copyright infringement of its computer programme by the Defendants*.

C (emphasis added).

[49] The plaintiff has not called any expert on computer programs to testify regarding the first element. As elaborated in the above sub-para. 28(ii), the plaintiff is not an expert on computer programs. In the circumstances, I find as a fact that the plaintiff has failed to prove the first element on a balance D of probabilities.

[50] I have not overlooked the plaintiff's evidence which showed a similarity between the screenshots of computer screen images and graphic user interface of the two programs and the Keybilling program. Such evidence cannot prove the first element because screenshots of computer E screen images and graphic user interface do not constitute evidence of source codes and object codes of a computer program. I refer to the following English High Court cases:

(i) in *Thrustcode Ltd & Anor v. WW Computing Ltd* [1983] FSR 502, at 505, F Robert Megarry VC decided as follows:

> In the normal case in which an infringement of literary copyright is alleged, it is possible to put side by side the written, typed or printed words in which the plaintiff claims copyright and the corresponding words which are said to infringe that copyright. The words can be seen and compared and discussed. *In the case of* G *computer programs, the software appears to consist of articles which by magnetic or electrical means will make the hardware do certain things, together with what is recorded on various tapes and discs. By means of this, the letters, signs and numbers of the program may be made to appear on a screen or on a print-out; and if this is done, then the familiar process of comparison is made possible. Yet where, as here, the claim is to copyright* H *in the program itself, the results produced by operating the program must not be confused with the program in which copyright is claimed*. If I may take an absurdly simple example, 2 and 2 make 4. But so does 2 times 2, or 6 minus 2, or 2 per cent. of 200, or 6 squared divided by 9, or many other things. *Many different processes may produce the same* I *answer and yet remain different processes that have not been copied one from another. For computers, as for other things, what must be compared are the thing said to have been copied and the thing said to be an infringing copy*.

> *If these two things are invisible, then normally they must be reproduced in visible form, or in a form that in some way is perceptible, before it can be determined whether one infringes the other.*
>
> (emphasis added); and

(b) *Thrustcode* has been followed by Ferris J in *John Richardson Computers Ltd v. Flanders & Anor* [1993] FSR 497, at 527, as follows:

> Before ending my comments on general approach I must, I think, address a further problem which arises in a case of this kind. *Under the 1988 Act [United Kingdom's Copyright, Designs and Patents Act 1988] computer programs are protected as "literary works". They are, nevertheless invisible to the eye which can discern a conventional literary work. As Sir Robert Megarry V-C remarked in the Thrustcode case, if two things which are invisible are to be compared then normally they must be reproduced in visible form, or in a form which is in some way perceptible, before it can be determined whether one infringes copyright in the other. The two main ways, perhaps the only ways, in which a computer program can be made visible are by printing out the code on paper or by displaying on screen the prompts, entries, reports and other material which the program presents in visible form to the user. The latter is not, however, itself the program. It is a product of the program. The fact that two programs may produce a similar screen display may or may not be indicative of a similarity in the programs. The screen display is not itself the literary work which is entitled to copyright protection.*
>
> (emphasis added).

[51] Based on *Elster Metering* and *Megnaway Enterprise*, the second element of first limb is fulfilled when the plaintiff proves a causal connection between the two programs and the Keybilling program, namely, the plaintiff must prove that the latter has been copied from the former, whether directly or indirectly (second element). No evidence to substantiate the second element has been led by the plaintiff in this case. In fact, SD1's evidence shows that the Keybilling program has been custom-made by ZYS for the defendant (pursuant to SD2's request).

[52] The third element of first limb, according to *Elster Metering* and *Megnaway Enterprise*, is that the plaintiff must satisfy the court that what has been copied in Keybilling program, constitutes the whole or a substantial part of the two programs (third element). In this case, sub-para. 1(b) in Annexure A of the plaintiff's FBP alleges that the defendant has copied the two computer programs in their entirety. Once again, the court can only decide the third element based on expert evidence. The plaintiff's failure to call an expert on computer programs to testify regarding the third element, is fatal to this suit.

[53] Premised on the above reasons, I am constrained to find as a fact that the plaintiff has failed to prove that the defendant has done an act regarding the Keybilling program which is controlled by the plaintiff's copyright in the two programs within the meaning of the three elements of the first limb.

Summary Of Court's Decision

[54] In summary:

(i) despite the plaintiff's conduct, the plaintiff's oral evidence is admissible in this case. However, the court has to scrutinise with great care the entire evidence of the plaintiff in deciding whether to attach any weight thereto. After a careful scrutiny of the totality of the plaintiff's evidence, the court finds as a fact that the plaintiff is not a credible witness;

(ii) the plaintiff did not call the IO to tender the seized items as evidence in this case. Accordingly, the plaintiff cannot rely on the raid to support this suit;

(iii) a function of a computer program constitutes an "idea" under s. 7(2A) of the CA which is not protected by copyright. The plaintiff cannot therefore rely on the functions of the two programs in this case to support this suit;

(iv) the plaintiff could not rely on the plaintiff's SD because the plaintiff's SD did not exhibit a true copy of the two programs (either in a CD or DVD) as mandatorily required by s. 42(1)(a)(iii) of the CA;

(v) the plaintiff has failed to prove that:

(a) he is the author of the two programs;

(b) sufficient efforts have been expended to make the two programs original in character within the meaning of s. 7(3)(a) of the CA;

(c) the two programs have been written down, recorded or otherwise reduced to material form as required under s. 7(3)(b) of the CA; and

(d) the two programs qualify for copyright protection under s. 10(1), (2)(a) or (3) of the CA;

(vi) an adverse inference under s. 114(g) of the EA is drawn against the plaintiff for not calling Mr Feng, the author of the source codes of the two programs, to testify in this case; and

(vii) this suit is dismissed because:

(a) the plaintiff has failed to prove that copyright subsists in the two programs and he is the owner of such a copyright. Accordingly, the plaintiff has no right to sue for copyright infringement under s. 37(1) of the CA; and/or

(b) infringement of copyright in the two programs pursuant to s. 13(1) of the CA read with the first limb has not been proven because:

(1) there is no expert evidence to prove the first and third elements; and/or

(2) the plaintiff has not proven that the entire or a substantial part of Keybilling program has been copied from the two programs.

[55] In the upshot, this suit is dismissed with costs.